89-421

Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1989

DEMOS REALTY,

Petitioner,

v.

MINNEAPOLIS COMMUNITY
DEVELOPMENT AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

---

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QUESTIONS PRESENTED

1. Whether the "state action" requirement has been satisfied which grants subject matter jurisdiction regarding Petitioner's claim that the Establishment Clause has been violated by a joint venture agreement between the City of Minneapolis, a private developer, and the Young Men's Christian Association of Metropolitan Minneapolis?

2. Whether secular-use restrictions on the activities of the Young Men's Christian Association of Metropolitan Minneapolis are required to ensure the aid provided by the City of Minneapolis does not have the primary effect of advancing the religious purposes of the Young Men's Christian Association of Metropolitan Minneapolis?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Petitioner, Demos Realty, and the Respondent, the Minneapolis Community Development Agency.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

DEMOS REALTY,
Petitioner,
v.
MINNEAPOLIS COMMUNITY
DEVELOPMENT AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF
THE STATE OF MINNESOTA

Petitioner, Demos Realty, respectfully prays that a writ of certiorari issue to review the final judgment and opinion of the Minnesota Supreme Court entered on May 11, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota (Appendix A, pp. 1a-10a) is reported at 439 N.W.2d 708 (Minn. 1989).

The opinion of the District Court of Hennepin County (Appendix A, pp. 11a-14a) is unreported.

JURISDICTION

1. The judgment of the Minnesota Supreme Court was entered on May 11, 1989 (Appendix A, p 1a). It is final by its terms.

2. Excerpts from the record showing the raising of the federal question are set out in Appendix A, pp. 1a-14a.

3. The jurisdiction of this Court is invoked under provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First Amendment's Establishment Clause and the Fourteenth Amendment, which makes the First Amendment applicable to the states. These provisions appear in Appendix B, p. 15a.

The statutory provisions involved are:

1. Section 117.042 of the Minnesota Statutes, which provides for the "quick taking" of private property for public use through condemnation proceedings (Appendix B, p. 15a).

2. Section 469.178 of the Minnesota Statutes, which authorizes the Minneapolis Community Development Agency's issuance of tax increment bonds (Appendix B, p. 16a).

STATEMENT

The case is the result of condemnation proceedings commenced by the Minneapolis Community Development Agency, a public agency, (hereinafter "MCDA") which sought to condemn property owned by Petitioner, Demos Realty (hereinafter "Demos"). The condemned property was to become one of the parcels of land given to a private developer (hereinafter "Developer") for the LaSalle Place Development Project. As part of the development, the Demos land was to be conveyed to the Young Men's Christian Association of Metropolitan Minneapolis (hereinafter "YMCA"). The development agreement between the Developer and MCDA required that the Demos land be conveyed to the YMCA as a condition to the development.

Trial Court

On January 27, 1989, Demos moved the Hennepin County District Court for an order dismissing the condemnation as unconstitutional on First Amendment grounds. Demos averred that state action existed and that the Developer and the MCDA had jointly participated in an activity which violated the Establishment Clause. Demos asserted that any aid given to the YMCA must be conditioned on restrictions regarding secular use (Appendix A, pp. 12a-14a).

On February 15, 1989, the District Court denied Demos' motion to dismiss the condemnation proceedings (Appendix A, pp. 11a-14a).

Minnesota Supreme Court

On April 18, 1989, Demos filed an appeal with the Minnesota Court of Appeals. Because of the importance of the questions presented, the Minnesota Supreme Court accepted accelerated review and ordered the case to be heard before it, rather than the intermediate Appellate Court.

Oral arguments were conducted before the Minnesota Supreme Court on May 5, 1989.

On May 11, 1989, the Minnesota Supreme Court affirmed the lower court's findings. The Court held that the MCDA's condemnation proceedings neither advanced religion nor fostered excessive entanglement and that any assistance which may have been provided the YMCA did not require secular use restrictions (Appendix A, pp. 5a-10a).

REASONS FOR GRANTING WRIT

This case presents important federal questions concerning: (1) the ability of a governmental agency to insulate itself from constitutional violations by working through a private party and (2) whether financial assistance given to an organization which has an admitted religious nature requires secular-use restrictions.

Petitioner submits that the Supreme Court of Minnesota has decided the above questions in a way which is not in accord with applicable decisions of this Court.

State Action

Although the Minnesota Court made no specific findings as to state action, it did refer to the activity as being of a private contractual nature between the Developer and the YMCA (Appendix A, p. 10a).

Petitioner submits that the amount of joint participation and mutual benefit, as between the Developer and the MCDA, raises the activity to a level whereby acts carried out by the Developer, concerning the YMCA, can be fairly attributed to the MCDA.

In *Lugar v Edmondson Oil Co.*, 457 U.S. 922 (1982) this Court, in summarizing its holdings in previous cases, stated that for private conduct to be attributed to the State, two requirements must be met:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State....Second, the party charged...must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

457 U.S. at 937.

The deprivation to Demos came as the result of the state exercising its power of eminent domain, its use of tax increment financing and the MCDA's support of the project with general revenue bonds. The first requirement of *Lugar* has therefore been satisfied.

When a private party's conduct is contrary to the intent of

the state or without state involvement, state action will not be found. *See Lugar* at 940. The conduct of which Demos complains is not contrary to the wishes of the MCDA. The MCDA fostered, encouraged and jointly participated in ensuring the YMCA was included in the LaSalle Place Project. The development documents explicitly require the MCDA to condemn the Demos property and to convey it to the Developer which will reconvey it to the YMCA. *Lugar*'s second requirement has been met.

If the Developer, which the Minnesota Court deemed a private party, was not involved and the MCDA was dealing directly with the YMCA, the use of the state's power of eminent domain, tax increment financing, and the issuance of revenue bonds would have required the MCDA to adhere to constitutional provisions. *See Hunt v. McNair*, 413 U.S. 734 (1973).

The state action relationship between the MCDA and the Developer thus established, the deprivation of Demos' property must not be accomplished in violation of the First Amendment's Establishment Clause.

Establishment Clause Violation

The modern analysis for Establishment Clause questions is defined by the three-part test which has emerged from this Court's decisions and has become known as the *Lemon* test. To pass muster, a statute must have: (1) a secular legislative purpose; (2) a principal or primary effect that neither advances nor inhibits religion; and (3) must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Petitioner concedes that there is a secular purpose and that excessive governmental entanglement is probably not involved.

Petitioner does aver that the Minnesota Court did misapply the second prong of the *Lemon* test by holding that aid could be given without secular use restrictions placed on it. This holding appears to be based on two findings. First, that only private parties were involved (a fact disputed in the state action argument above). Secondly, that the YMCA is not a pervasively religious organization and only its secular activities would be benefitted.

Among the considerations mentioned by this Court to determine if the second part of the *Lemon* test has been met is whether a religious entity has been singled out for benefit, rather than benefits accruing to a broad grouping of which

religious organizations are only a part. *See Mueller v. Allen*, 463 U. S. 388, 397 (1983) (provision of benefits to a broad spectrum of groups is an important index of secular effect); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794 (1973) (narrowness of a benefitted class is an important factor in evaluating whether the effect of the law violates the Establishment Clause).

Here the YMCA has been singled out as the narrow beneficiary of the aid being provided by the government. Quoting from Justice O'Connor, in *Lynch v. Donnelly*, 465 U. S. 668, 688 (1984), this type of endorsement of a religious organization "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

The health facilities provided on a non-discriminatory basis to the public in *Corp. of Presiding Bishop v. Amos*, 483 U. S. 327 (1987) are analogous to those provided by the YMCA. In *Amos* no bright line could be drawn between the religious and secular nature of the health facilities. Nevertheless, this Court determined that the advancement of religion could not fairly be attributed to government acts as opposed to acts of the Church.

In the case at Bar, there is direct government action: the Demos property is being condemned by the City and given to the YMCA, and the transaction financed through the use of tax increment financing and government obligation bonds.

Religious and non-religious activities will coexist in the new premises provided to the YMCA. It is Demos' position that for the public agency to provide aid to the YMCA, it must be accompanied by secular use restrictions so that no aid is given to advance the religious mission of the YMCA. *See Wolman v. Walter*, 433 U. S. 229 (1977); , *Meek v. Pittenger*, 421 U. S. 349 (1973); *Hunt v. McNair*, 413 U. S. 734 (1973); *Tilton v. Richardson*, 403 U. S. 672 (1971).

By conceding the fact that the YMCA has religious aspects the Minnesota court was therefore in error in not requiring secular use restrictions on the aid provided.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A
Opinions Below

STATE OF MINNESOTA
IN SUPREME COURT
CO-89-513

Hennepin County — Simonnet, J.

In the Matter of the
Condemnation by the
Minneapolis Community
Development Agency
of Certain Lands
in the City of Minneapolis

Filed May 11, 1989
Office of Appellate Courts

SYLLABUS

The inclusion of a YMCA health and recreation facility in a development project does not cause the taking of other property in this condemnation proceeding for the project to violate the First Amendment.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

This is an appeal from orders of the district court granting a petition to condemn property and authorizing a quick take. The appellant landowner claims the taking violates the establishment clause of the First Amendment and asks either that the condemnation proceeding be dismissed or that an evidentiary hearing be held on the constitutionality of the taking. We deny appellant's claims and affirm the district court.

The LaSalle Place Development Project is a program to

develop a block in downtown Minneapolis bounded by Hennepin Avenue, Eighth Street, LaSalle Avenue, and Ninth Street. This block is within a development district authorized by the City of Minneapolis and created by the Minneapolis Community Development Agency (the Development Agency). It is also within a new tax increment district. The Development Agency has entered into a contract with HTPG Associates Limited Partnership (the Developer) to develop the project. Plans include restoring and preserving the State Theater Building, rehabilitating the existing YMCA Tower for rental housing or office space, and demolishing other existing buildings in the block to be replaced by new construction. To acquire the property to carry out this project, the Development Agency has filed a petition for condemnation. The petition includes a parcel fronting on Hennepin Avenue owned by appellant, Demos Realty.

In the southeastern corner of the block is the YMCA Tower building owned by the Young Men's Christian Association of Metropolitan Minneapolis (the YMCA). This property, although part of the development project, is not included in the condemnation petition. Instead, the Development Agency has agreed with the Developer to purchase the YMCA Tower from the YMCA for not more than $2.5 million and to convey it to the Developer for one dollar. In turn, the YMCA has contracted with the Developer to buy, for $630,000, condominium space in a new building to be erected by the Developer mostly on the site where the Demos building is now located. As owner of the condominium space, the YMCA will build, at its own expense, a new facility for its operations.[1]

The petition for condemnation was filed in district court on December 12, 1988. With the petition, the Development Agency also filed a motion for a "quick take" pursuant to Minn. Stat. § 117.042 (1988). Demos Realty filed a motion to dismiss the petition because the taking was unconstitutional or, in the alternative, for an evidentiary hearing or trial. Demos

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[1] The new YMCA facility will consist of approximately 115,000 gross square feet of space in the six above-ground levels of the new building and on the roof, plus apparently some incidental use of the first underground level of the building. The facilities will include, among other things, a day care center, gymnasium, multi-purpose room, swimming pool, lockers, playing courts, exercise room, track, lounge, assembly room, and regional administrative offices.

contended that the YMCA is a religious organization and that the proposed taking is an integral step in a development project which will aid and advance the religious purposes of the YMCA. Considerable documentary evidence was produced at the hearing, including the various contracts involving the city, the Development Agency, the Developer, and the YMCA. Also produced were documents describing the YMCA, its organization, operations, and aims.

The district court conducted a hearing on January 27, 1989. Demos' motion for a further evidentiary hearing was denied, and the petition for condemnation was granted, including the quick take. Demos' subsequent request for a stay of enforcement of the quick take order was also denied. Demos has appealed from the orders of the district court. We granted the Development Agency's request for accelerated review. An amicus brief has been filed by the Minnesota Civil Liberties Union. Additional facts will be developed in the discussion which follows.

I.

We have two threshold issues: (1) Is appellant's First Amendment challenge properly before the court at this time? (2) If so, should appellant's request for an evidentiary hearing on its constitutional challenge have been granted?

The Development Agency contends that at the hearing of the petition to condemn the only issue is whether the petition meets the requirements for eminent domain, *i.e.*, whether the procedural requirements have been met and whether the taking is necessary and for a public purpose. *See* Minn. Stat. § 117.075 (1988). This is not the time nor place, says the Development Agency, for appellant to raise an issue involving the constitutional implications of the development project itself.

Here the district court has found the taking is necessary and for a public purpose; indeed, Demos does not challenge this finding except as the taking may impermissibly benefit the YMCA. In *State by Spannaus v. Hopf*, 323 N.W.2d 746 (Minn. 1982), the state petitioned to condemn defendant's outdoor advertising signs. On appeal from a granting of the petition, we considered the defendant's constitutional claims that the taking violated the equal protection clause and defendant's free speech rights under the First Amendment. *Id.* at 752-53. Similarly, we see no reason why we should not consider

Demos' constitutional claims at this time in this appeal.

Demos next argues it was denied the right to an evidentiary hearing under Minn. Stat. § 117.075, which says "the court *** shall hear all competent evidence offered for or against the granting of the petition, regulating the order of proof as it may deem best." Demos cites several of our cases where evidentiary hearings were held prior to the granting of the condemnation petition. *See, e.g., City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386,389 (Minn. 1980); *State v. Anderson*, 220 Minn. 139, 146, 19 N.W.2d 70, 74 (Minn. 1945).

We agree the objecting landowner is entitled to an evidentiary hearing. No record was made of the January hearing. It appears, however, that considerable documentary evidence was presented to the court on the constitutional issue and that the issues were thoroughly argued and briefed. The trial court then made findings and arrived at its decision that there was no constitutional violation involved in the taking. The question, then, is whether the January evidentiary hearing provided by the trial court was adequate.

Demos contends that a further hearing was necessary so it could present more testimony on the YMCA's religious status and future intentions, as well as expert testimony on the financing arrangements, the nature of the benefits to be received by the YMCA, and the reasonableness of the price paid to the YMCA for its building. It seems to us, however, as will become evident in Part II of this opinion, that the January 27, 1989, hearing on the petition constituted an adequate evidentiary hearing on the constitutional issues. The facts Demos claims it would produce at a further evidentiary hearing are already before the court in sufficient detail. The nature of the benefits to the YMCA and the financing arrangements are determined by the contracts in the present record. Evidence of the religious aspects of the YMCA are set out in the submitted documents and, indeed, the religious nature of the YMCA is not disputed by the Development Agency. Demos has failed to show how any information it might produce at a further evidentiary hearing is needed to resolve its constitutional claims. Apparently, too, this was the view of the trial court. It appears that Demos did not claim dissatisfaction with the record until after it received an adverse decision. We hold it was not error

for the trial court to deny Demos' motion for a further evidentiary hearing.[2]

II.

We not take up the constitutional issue. The First Amendment prohibits state action "respecting an establishment of religion." The establishment clause is intended to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970). An establishment clause challenge invokes the three-part *Lemon* analysis: (1) the state's program must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Here it is undisputed that the development project has a secular purpose. Demos claims, however, that the "advancement" and "entanglement" prohibitions have been violated.

Admittedly, the YMCA has a religious dimension. Apparently it was originally incorporated as a religious association, *see* Minn. Stat. § 315.44 (1988), although it has since chosen to be governed as a nonprofit corporation. *See* Minn. Stat. § 317.06(2) (1988). The YMCA claims a real estate tax exemption as "an institution of purely public charity" and, it its tax exemption statement, states the principal use of its property to be:

> To carry out the program services necessary to achieve the charitable and social purposes for which this association was

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[2] The Development Agency, as already mentioned, also filed a petition for transfer of title and possession under Minn. Stat. § 117.042 (1988). This quick take statute permits the petitioner to acquire title and possession of an owner's property prior to the filing of an award by giving 90 days' notice and depositing the appraised value of the property with the court.

Demos claims this quick take procedure denies it due process because, if it should subsequently be determined that its property (perhaps by then demolished) should not have been taken, it will then be too late and it will be without an adequate remedy. In *Fine v. City of Minneapolis*, 391 N.W.2d 853, 856 (Minn. 1986), we pointed out that the landowner is not without a remedy, that it may recover compensation for destruction of its property, and that the quick take statute is constitutional.

organized and for which it is incorporated in the State of Minnesota, particularly those related to social and physical development, training, camping, environmental education, recreation and counseling for youth and other persons.

Demos points out that the Minneapolis YMCA is affiliated with the National YMCA Council which states its purpose to be: "The Young Men's Christian Association we regard being in its essential genius a worldwide fellowship united by a common loyalty to Jesus Christ for the purpose of developing Christian personality and building a Christian society." Demos also quotes from the constitution of the National Council the statement that the Young Men's Christian Association, in its role of improving the spiritual, intellectual, and physical well-being of young people, seeks "to develop a faith for daily living based upon the teaching of Jesus ***."

The informational brochure of the Minneapolis YMCA gives a general description of its operations, including membership eligibility and the programs and services available. The brochure has a Mission Statement stating, "The Downtown YMCA is a human care organization committed to the enhancement of Christian values."[3] The brochure mentions among its many programs the New Media Bible, a series of films depicting biblical scenes "available for use by local groups."[4]

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[3] The Mission Statement goes on to say that its mission is --

* To significantly influence the quality of life for all persons, all religions, races, ages, and needs.
* To promote total human health: body, mind and spirit.
* To focus on physical well-being, spiritual discovery, ethical and social values and interpersonal relations.
* To serve as a common meeting ground of the Downtown community.
* To maintain an organization of employees and volunteers who are at all times respected, accessible, involved and committed.

[4] The New Media Bible is described as follows:

The YMCA has available for use by local groups a series of twenty 15-20 minute, 16mm color films which depict scenes from the Bible. The series, entitled "The New Media Bible," has 18 films on Genesis (Chapters 1-50) and 15 from Luke's gospel (Chapters 1-24). A session for group leaders is required for use. After completion of the training, one may borrow the films for the YMCA free of charge. Persons interested in the training session should call 371-8798.

It is undisputed, however, that the YMCA also provides nonsectarian recreational, health, and social service activities without regard for any religious belief or affiliation. The Development Agency points out that the YMCA operates predominantly as a health and recreation facility available, as its brochure states, to "all persons, all religions, races, ages, and needs." The public considers the Minneapolis YMCA as serving a useful nonsectarian charitable purpose as evidenced by the inclusion of the organization in the United Way Fund. It is this secular, communitywide operation, says the Agency, which makes the YMCA a desirable anchor tenant for the LaSalle Place Project, attracting the general public and invigorating the economic and social environment of the project to the benefit of the entire downtown community.

The "advancement" test"

For purposes of constitutional analysis, the question is not whether the YMCA has religious aspects, which admittedly it does, but the extend to which the religious dimension permeates the institution. In determining whether state aid advances religion in violation of the establishment clause, the test is:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Hunt v. McNair, 413 U.S. 734, 743 (1973).

Here the trial court found that the Minneapolis YMCA is not pervasively religious, that its functions are not subsumed in its religious mission. This finding is amply sustained by the evidence and is not clearly erroneous. If one looks beyond the "Institutional rhetoric," *Hunt*, 413 U.S. at 743, it appears that despite its name and religious roots, the YMCA operates its health and recreational center in a nonsectarian manner. Moreover, it is clear, as the trial court also found, that the LaSalle Place Project does not fund a specifically religious activity in

an otherwise substantially secular setting.

Because any aid would not have a primary effect of advancing religion, we need not consider whether, in fact, aid is being received. Nevertheless, it is clear to us that any aid the YMCA receives is no more than the reduced interest charges the Baptist college in *Hunt* was able to obtain by financing its construction with revenue bonds issued by a state-created authority. Demos suggests there may be a question of the reasonableness of the price paid for the YMCA parcel and of the YMCA investment, as well as the use of tax increment financing. The trial court, however, based on its review of the contract documents, found that "no aid was given to the YMCA," and this finding is not clearly erroneous. Despite the tax increment financing arrangement, the YMCA is contracting independently with the Developer for the building of its own facilities and will pay, with its own funds, for the development of its condominium space. The YMCA and the Developer will share the "hard costs" of constructing the common support elements of the new building; in addition, although Demos argues that the YMCA pays no "developer's fee," the YMCA does pay its share of the "soft costs" for design and architectural services. In other words, the YMCA is not receiving any public subsidy but is paying its own way.[5] Of course, there are advantages to the YMCA in having new quarters in a rejuvenated downtown block, just as there are advantages to the project in having a health and recreational center as an anchor. But these indirect considerations do not impose upon the neutrality required by the establishment clause. *See also Minnesota Higher Educ. Facilities Auth. v. Hawk*, 305 Minn. 97, 232 N.W.2d 106 (1975) (where this court, following *Lemon* and *Hunt*, upheld the constitutionality of revenue bonds issued by a state authority to finance facilities at state private colleges).

Finally, Demos points to a provision in the Developer's contract with the YMCA wherein the Developer agrees "not to build or lease space for others in the project for health or

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[5] "[T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt*, 413 U.S. at 742-43 (citations omitted).

exercise club facilities that might compete directly for users with the YMCA * * * ." This noncompetition clause, argues Demos, advances the purposes of the YMCA.

– We fail to follow appellant's argument. Of course, the noncompetition clause advances the purposes of the YMCA, *i.e.*, its nonsectarian business purposes. Any tenant making a substantial business investment would want protection against debilitating competition from another tenant in the same block. A developer, too, prefers one thriving tenant to two struggling competitors. We take judicial notice that noncompetition agreements in commercial complexes are common. In other words, the purpose of the noncompetition clause is to advance business, not religion. If anything, the presence of the noncompetition clause supports the Agency's argument that the YMCA's presence in the block is a nonsectarian, business purpose.

We conclude, as did the trial court, that the taking challenged here neither advances nor inhibits religion.

The "entanglement" test.

Excessive entanglement arises when the state's involvement with a religious institution creates a need for "comprehensive, discriminating, and continuous state surveillance"; it applies only in those cases where the government must be sure that its aid is used only for secular purposes. *See Lemon*, 403 U.S. at 619; *Roemer v. Board of Public Works*, 426 U.S. 736, (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971).

Demos points to documents wherein the Developer and the YMCA agree to cooperate in the development of the LaSalle Place Project. This is an understanding the YMCA has with the Developer, not the Development Agency. In any event, in planning and building the project, one would expect the YMCA in constructing its new quarters as the anchor tenant to coordinate its efforts with the Developer. This does not create any entanglement with religion. To the extent it can be said the Development Agency is involved, its involvement is indirect and is analogous to the one-time construction grant in *Tilton* which was held not to be an entanglement. 403 U.S. at 688. We do not have here any ongoing grants nor any need for ongoing governmental supervision of the YMCA's activities. This, too, was the conclusion of the trial court.

Demos also contends there should be restrictions on the sectarian use of the YMCA property. Its argument stems from a misreading of *Tilton*. In that case federal legislation provided

grants to colleges for construction of academic facilities which, however, could not be used for religious purposes for 20 years. This meant, said the United States Supreme Court, that the federal act expressly allowed the college to use the facility for any purpose at the end of 20 years, and this would include a religious use. The Court held this statutory provision facially invalid as violating the establishment clause. 403 U.S. at 683. Obviously, a statute affirmatively permitting religious use of a federally funded building is unconstitutional. There is no similar provision in any of the contracts for the LaSalle Place Project, either with the YMCA or, for that matter, with any tenant.

Neither do we see in this case need for restrictions forbidding a religious use not contemplated and which would be inconsistent with the contractual intent of the private parties. *See Roemer*, 426 U.S. at 760 (courts will presume parties will observe constitutional prohibitions). Here we have a private developer contracting with an organization not pervasively religious to provide, as an anchor tenant in a commercial redevelopment project, a nonsectarian, nonsubsidized health, day care, and recreational facility for the general public. To the extent the Development Agency has assisted to make the YMCA property available to the project, this is, as already observed, a one-time assistance only, which does not present any entanglement requiring use restrictions.

The Development Agency's condemnation proceeding neither advances religion nor fosters excessive government entanglement with religion and, therefore, does not violate the establishment clause.

Affirmed.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

IN THE MATTER OF CONDEMNATION BY THE MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY OF CERTAIN LANDS IN THE CITY OF MINNEAPOLIS

ORDER AND MEMORANDUM

Court File #CD2113

The above-entitled matter came on for hearing before the Honorable Andrew W. Danielson, a Judge in the above-named Court, on January 27, 1989, at 8:45 a.m. Demos Realty moved for an Order denying the Petition of the Minneapolis Community Development Agency's Motion for Transfer of Title of Possession under Minn. Stat. § 117.042 as being in violation of the First Amendment of the United States Constitution.

Robert J. Hajek, Esq. appeared on behalf of Demos Realty and Wayne G. Popham, Esq. appeared on behalf of the Petitioner, Minneapolis Community Development Agency.

Upon all the files, records and proceedings herein, the arguments of counsel and the Court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That Demos Realty's Motion to Deny the Petition of the Minneapolis Community Development Agency is hereby denied.
2. That the attached memorandum be made part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

s/Andrew W. Danielson
Andrew W. Danielson
Judge of District Court

Dated 15 February, 1989

MEMORANDUM

The present motion to deny the Petition of Minneapolis Community Development Agency (MCDA) arose from various facts. The MCDA has proposed to condemn and develop certain lands in downtown Minneapolis. The proposal would be funded by the City of Minneapolis through tax incremental financing (TIF). Two of the owners of the proposed condemnation property are the YMCA of Minneapolis and Demos Realty.

The objection to the Petition stemmed from the condemnation and development proposal for the YMCA. Demos Realty (Demos) challenged the condemnation and development on the grounds that it was violative of the Establishment Clause of the United States Constitution.

I. LAW

The test to evaluate whether State action is violative of the Establishment Clause is laid out in *Lemon v. Kurtzman*, 403 U.S. 603 (1971). The test has three parts:

1. Whether the action has a secular legislative purpose;
2. Whether the action has the primary effect of advancing or inhibiting religion;
3. Whether the action fosters excessive governmental entanglement.

Id., at 612.

II. ANALYSIS

1. The condemnation and development proposal of the MCDA has a secular legislative purpose.

Both the MCDA and Demos agree that there is a secular legislative purpose to the proposed development. Among the secular benefits derived from the development are an enhanced tax base for the City, redevelopment of run down areas and preservation of historic buildings. Thus, the first prong of the *Lemon* test has been met.

2. The condemnation and development proposal has no primary effect of advancing or inhibiting religion.

Aid deemed to have the primary effect of advancing or inhibiting religion occurs when aid flows to an institution which is so pervasively religious that its functions are consumed by the institution's religious mission. *Hunt v. McNair*, 413 U.S. 734,743 (1973). Advancing or inhibiting religion also occurs when aid is used specifically to fund a particular religious activity in a typically secular setting. *Id.*, at 743. Neither instance above applies to the case at bar.

The above rules do not apply to the present condemnation and development because no aid was given to the YMCA. In fact, the YMCA would share some construction costs with the project developer. The shared costs would relate to common elements of the development of the YMCA. After construction of the development, the YMCA would fund the completion of their new facility. However, assuming the condemnation and development would be aid to the YMCA and assuming the YMCA is a religious institution, the primary effect of the proposal would still not advance or inhibit religion.

The YMCA is not a pervasively religious institution as described in *Hunt, supra.* The YMCA's functions are not consumed by its religious mission. Although the YMCA may have a religious foundation, its facilities are not pervasively sectarian.

The YMCA welcomes all religions through its doors to utilize its resources, which include athletic and social aspects. Moreover, assuming the condemnation and development are aid to the YMCA, that aid would not be the type which specifically funds a religious activity of the YMCA. There is little evidence suggesting the YMCA performs specific religious activities in its predominantly secular setting. Therefore, for all the foregoing reasons, the second prong of the *Lemon* test has been met.

3. The condemnation and development proposal does not foster excessive governmental entanglement.

Once again, to involve excessive governmental entanglement, the YMCA must be considered a religious institution and the condemnation and development must be considered aid to the YMCA. Assuming the above factors to be present, excessive

government entanglement arises only when there is a need for "comprehensive, discriminating and continuous state surveillance" to ensure that aid is used for proper secular purposes. *Lemon*, 403 U.S. at 619; *see, e.g., Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976); *Mueller v. Allen*, 463 U.S. 388 (1983); *Tilton v. Richardson*, 403 U.S. 672 (1971). In addition, the Supreme Court held that there was no excessive governmental entanglement where the government supplied a one-time, single purpose construction grant. *Tilton*, 403 U.S. at 688.

The present condemnation and development does not foster excessive entanglement. Neither MCDA nor the City of Minneapolis performs a comprehensive surveillance program to monitor the use of the City's funds. The agreement between the YMCA and the developer merely requires the YMCA board members to confer with the developer on various issues. Moreover, the present case is very similar to the *Tilton* grant. The TIF financing would be equivalent to the *Tilton* one-time, single purpose construction grant. The TIF funds are used to construct the development and do not require an ongoing financial relationship between the City and the YMCA. There are also no annual grants to the YMCA nor yearly audits. Both annual grants and yearly audits are potentially violative of the Establishment Clause. *See, e.g., Roemer*, 426 U.S. at 763 (citing *Tilton*, 403 U.S. at 688.). Therefore, for all the above reasoning, the third prong of the *Lemon* test has been met.

III. CONCLUSION

The condemnation and development proposed by the MCDA does not violate the Establishment Clause of the United States Constitution. The proposal has a secular legislative purpose that neither advances nor inhibits religion and does not foster excessive governmental entanglement. For all the foregoing reasons and based upon all the files, proceedings and arguments herein, the Demos request for an Order denying the Petition of MCDA is hereby denied.

s/A.W.D.
A.W.D.

Appendix B
Statutes Involved

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

Amendment [I] [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statute 117.042 Possession

Whenever the petitioner shall require title and possession of all or part of the owner's property prior to the filing of an award by the court appointed commissioners, the petitioner shall, at least 90 days prior to the date on which possession is to be taken, notify the owner of the intent to possess by notice served by certified mail and before taking title and possession shall pay to the owner or deposit with the court an amount equal to petitioner's approved appraisal of value. Amounts deposited with the court shall be paid out under the direction of the court. If it is deemed necessary to deposit the above amount with the court the petitioner may apply to the court for an order transferring title and possession of the property or

properties involved from the owner to the petitioner. In all other cases, petitioner has the right to the title and possession after the filing of the award by the court appointed commissioners as follows:

(a) if appeal is waived by the parties upon payment of the award

(b) if appeal is not waived by the parties upon payment or deposit of three-fourths of the award. The amount deposited shall be deposited by the court administrator of court in an interest bearing account not later than the business day next following the day on which the amount was deposited with the court. All interest credited to the amount deposited from the date of deposit shall be paid to the ultimate recipient of the amount deposited.

Nothing in this section shall limit rights granted in section 117.155.

Minnesota Statute 469.178 Tax increment bonding

Subdivision 1. Generally. Notwithstanding any other law, no bonds, payment for which tax increment is pledged, shall be issued in connection with any project for which tax increment financing has been undertaken except as authorized in this section. The proceeds from the bonds shall be used only in accordance with section 469.176, subdivision 4, as if the proceeds were tax increment, except that a tax increment financing plan need not be adopted for any project for which tax increment financing has been undertaken prior to August 1, 1979, pursuant to laws not requiring a tax increment financing plan. The bonds are not included for purposes of computing the net debt of any municipality.

Subdivision 2. Municipality's general obligation bonds. A municipality may issue general obligation bonds to finance any expenditure by the municipality or an authority the jurisdiction of which is wholly or partially within that municipality, pursuant to section 469.176, subdivision 4, in the same manner and subject only to the same conditions as those provided in chapter 475 for bonds financing improvement costs reimbursable from special assessments. Any pledge of tax increment, assessments, or other revenues for the payment of the principal of and interest on general obligation bonds issued under this subdivision, except when the authority and the municipality are the same, shall be made by written agreement by and between the authority and the municipality and filed with the county

auditor. When the authority and the municipality are the same, the municipality may by covenant pledge tax increment, assessments, or other revenues for the payment of the principal of and interest on general obligation bonds issued under this subdivision and shall file the resolution containing the covenant with the county auditor. When tax increment, assessments, and other revenues are pledged, the estimated collections of the tax increment, assessments, and other revenues so pledged may be deducted from the taxes otherwise required to be levied before the issuance of the bonds under section 475.61, subdivision 1, or the collections thereof may be certified annually to reduce or cancel the initial tax levies in accordance with section 475.61, subdivision 1 or 3.